No. 397.

Brief of Atty. Gen. [illegible]
for United States.

Filed Mar. 9, 1898.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

A. J. SELVESTER, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

JAS. E. BOYD,
Assistant Attorney-General.

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STATEMENT.

James Selvester, the plaintiff in error, was tried and convicted in the district court of the United States for the northern district of California at May term, 1896, and was sentenced to pay a fine of $1,000 and to be imprisoned at hard labor for the term of ten years. Selvester was tried upon a bill of indictment containing four counts, the indictment being as follows (Rec., pp. 2–4), omitting formal parts:

> (1st count.) * * * James Selvester * * * did then and there unlawfully, willfully, knowingly,

and feloniously, and with intent then and there to defraud some person or persons whose name or names is or are to the grand jurors aforesaid unknown, have in his, the said James Selvester's, possession the following three pieces of false, forged, and counterfeit coins of metal, to wit, three pieces of false, forged, and counterfeit coins of metal, each one of which said pieces of false, forged, and counterfeit coins of metal was then and there in the resemblance and similitude of a silver coin of the United States of America of the denomination known as and called a half dollar or fifty-cent piece, which had been coined and stamped at a mint of the United States, etc.

(2d count.) * * * James Selvester * * * did then and there unlawfully, willfully, knowingly, and feloniously, and with intent to defraud one Ruben Baker, pass, utter, publish, and sell as true to the said Ruben Baker the following two pieces of false, forged, and counterfeit coins of metal, to wit, two pieces of false, forged, and counterfeit coins of metal, each one of which said two pieces of false, forged, and counterfeit coins of metal was then and there in the resemblance and similitude of a silver coin of the United States of America of the denomination of and known as a half dollar or fifty-cent piece, which had been coined and stamped at a mint of the United States, etc.

(3d count.) * * * James Selvester * * * did, then and there, unlawfully, willfully, knowingly, and feloniously, and with intent to defraud one Wolf Rudee, pass, utter, publish, and sell as true to the said Wolf Rudee the following three certain pieces of false, forged, and counterfeit coins of metal, to wit, three pieces of false, forged, and counterfeit coins of metal, each one of which said three pieces of false, forged, and counterfeit coins of metal was then and there in

> the resemblance and similitude of a silver coin of the United States of America of the denomination known as and called a half dollar or fifty-cent piece, which had been coined and stamped at a mint of the United States, etc.
>
> (4th count.) * * * James Selvester * * * did then and there feloniously, knowingly, and unlawfully falsely make, forge, and counterfeit five certain pieces of metal in the resemblance and similitude of silver coins of the United States called half dollars or fifty-cent pieces, which had been coined at a mint of the United States, etc.

The jury, after having the case under consideration for several hours, came into court and rendered the following written verdict (Rec., p. 10):

> We, the jury, find James Selvester, the prisoner at the bar, guilty on the first, second, and third counts of the indictment and disagree on the fourth count of the indictment.

It was to this verdict that the plaintiff in error excepted, and upon the refusal of the court to arrest judgment, to set aside the verdict, or to grant a new trial, the assignments of error are based. The only question for the court here is, Whether or not the verdict as rendered by the jury, under the circumstances, is sufficient in law?

ARGUMENT.

It will be observed (Rec., p. 10) that the jury, after being charged by the court, retired for deliberation upon the case at 12.34 p. m. Subsequently, at 2.42 p. m., the jury returned into court and asked for and received further instructions, and again returned into court at 3.45

p. m. and asked for and received further instructions from the court, and, upon receiving the desired instruction, rendered the verdict in writing. By an examination of the record (p. 16) the court will see the further proceedings which were had.

When the jury came into court the second time, they announced that they were unable to agree, but stated that they had agreed on the first three counts of the indictment, but could not agree on the fourth count, and asked the court if they could return such a verdict. The court informed them that they could, and the district attorney then asked leave of the court to enter a nolle prosequi as to the fourth count, to which motion the counsel for the defendant objected, and upon such objection the district attorney withdrew his said motion, and the jury then, without retiring, drew up and signed the verdict above set forth. The defendant then and there objected to the reception of the verdict on the ground that it was incomplete and not fully responsive to the issues, and, upon the court's overruling the objection, excepted. The assignments of error are as follows (p. 17):

> First, that the court erred in denying defendant's motion for arrest of judgment herein.
>
> Second, that the court erred in denying the defendant's motion to set aside the verdict rendered herein.
>
> Third, that the court erred in denying the defendant's motion for a new trial.
>
> Fourth, that the court erred in proceeding to sentence upon the verdict rendered herein.

Though there are four several assignments of error, they are to the same end, namely, based upon the objec-

tion to the reception of the verdict as rendered by the jury and the pronouncing of judgment thereon by the court.

The indictment in substance in the first count charges the possession of counterfeit coin with intent to defraud; in the second count charges the uttering of counterfeit coin with intent to defraud one Ruben Baker; in the third count charges the uttering of counterfeit coin with intent to defraud one Wolf Rudee; and in the fourth count charges the actual making, forging, and counterfeiting of the coin by Selvester.

Every one of the several counts charges a distinct and separate offense, upon either of which the defendant could have been prosecuted in a separate bill, and which would not have been joined in this bill except for the provisions of section 1024 of the Revised Statutes, the transactions constituting the same class of crimes alleged to have been committed by the same person, and being joined in one bill in separate counts, as required by the said section.

The facts in relation to the bill of indictment, the trial, and the rendition of the verdict are presented in this brief in order that the court may, without the inconvenience of resorting to the record, understand the point involved. Was the verdict sufficient in law to authorize the court to proceed to judgment? That is the only question.

It would seem that the plaintiff in error is dissatisfied because the jury found him guilty of only three several criminal offenses, instead of going a step further and convicting him of four.

In *Deady* v. *United States*, 152 U. S., 539, referred to in brief of plaintiff in error, the position taken in behalf of the United States here is sustained; that is, "each count is in form a distinct charge of a separate offense, and hence a verdict of guilty or not guilty as to it is not responsive to the charge in the other counts." In other words, whatever may have been the action upon one of the several counts in the bill of indictment in this case, it did not affect the other counts. Each one of the counts in the bill under consideration raised a separate and distinct issue standing alone for the jury to pass upon in the light of the testimony pertaining to it. For example, the prosecution may have introduced testimony only tending to show that Selvester had counterfeit coin in his possession knowingly and with intent to defraud. This would authorize the jury, if such testimony was convincing, to convict upon the first count, but it would not authorize a conviction upon the second, third, or fourth counts. Further, after showing that Selvester had knowingly had counterfeit coin in his possession, the prosecution could proceed a step and prove that he passed it to Baker. This would authorize a conviction upon the second count, but not upon the third or fourth counts. Then evidence that Selvester knowingly and with fraudulent intent passed counterfeit coin to Rudee would warrant the jury in convicting him on the third count; but testimony to this extent upon the first, second, and third counts would not authorize the jury to convict upon the fourth count, for before a conviction could be had upon that count the pros-

cution must prove that Selvester actually made the counterfeit money himself.

Why the district attorney withdrew his entry of a nolle prosequi as to the fourth count is not explained, for undoubtedly he had a right to make such an entry (*Commonwealth* v. *Stedman*, 12 Met. (Mass.), 444), or he could have asked the court to direct that the jury return a verdict of not guilty upon the fourth count, and the court could have taken this course. But I will not discuss what might have been done, as the court here will take into consideration only that which was done.

The proposition laid down by the plaintiff in error in effect is this: That a man must escape conviction and punishment for three several crimes of which a jury says he is guilty, simply because the jury fails to agree that he is proven to be guilty of a fourth offense. No one will contend that every one of the four counts in the indictment does not allege a separate and distinct offense upon which Selvester might have been tried without involving the other counts. "A conviction may be on one of several counts, each charging a distinct offense, with a discharge upon the others, either in express terms, or by silence, which is regarded as a constructive acquittal." A. & E. Encycl., vol. 28, 375.)

In *Commonwealth* v. *Stedman* (12 Met. (Mass.), 444), cited above, the defendant was tried on a bill containing six counts. The jury returned a verdict that the defendant was guilty of the charge contained in the third count and stated that they had not agreed as to the other counts. This verdict was sustained by the supreme judicial court

of Massachusetts, and it is also decided in the same case that the Commonwealth's attorney had a right to enter a nolle prosequi as to the counts in which the jury could not agree to a verdict.

The counsel for the defendant in that case undertook to maintain substantially the same position as did Selvester in this case, namely, that the defendant had a right to a verdict on all the counts; that the district attorney could not enter a nolle prosequi as to the counts upon which the jury failed to agree; that a verdict on a part of the complaint, leaving the rest unsettled, can not be received without the defendant's consent. The contention of the Commonwealth's attorney, however, was that the court might well have received a verdict on one count without a nolle prosequi, although the jury did not agree as to the others, and he cited in support of this position *Commonwealth* v. *Wood*, 12 Mass., 312; *Inhabitants of Sutton* v. *Inhabitants of Dana*, 1 Met. (Mass.), 383; *French* v. *Hanchett*, 12 Pick., 15; *State* v. *Woodruff*, 2 Day, 504.

The rule, as I understand it, is that where a verdict is rendered on less than the whole number of counts the verdict should specify the counts on which it is rendered. The jury in this case, in their written verdict, found, specifically, that the defendant was guilty upon the first, second, and third counts of the indictment. (*Day* v. *People*, 76 Ill., 380.) A verdict may be found by naming on what counts the defendant is guilty. (*Nabors* v. *State*, 6 Ala., 200.)

Where a jury find a defendant guilty on one count, and say nothing in their verdict concerning other counts,

it will be equivalent to an acquittal as to them. (*State* v. *Taylor*, 84 N. C., 773.) This authority is in line with the citation from the A. and E. Encyclopædia of Law above. Upon an indictment containing nine counts for embezzlement of different grades, and other counts for larceny, a verdict of "guilty of embezzlement" is equivalent to an acquittal of the larcenies charged and a bar to any subsequent prosecution. (*Guenther* v. *People*, 24 N. Y., 100.)

In the case here, Selvester was found guilty of three of the four offenses charged against him, by the rendition of a verdict giving the numbers of the counts upon which he was convicted. Now, if the result of a disagreement as to the fourth count amounts to an acquittal, then Selvester has no cause for complaint, for the failure to agree was to his benefit.

Where different degrees of offense are charged in the different counts of an indictment, it is proper practice for the verdict (if against the defendant) to state under which count he is found guilty. (*Carter* v. *State*, 20 Wis., 647.) But I do not regard it as necessary to discuss the question involved in this case further.

I rest the case for the Government upon the position that the verdict as returned by the jury and received by the court is valid, and is not only not subject to objection, but is in accordance with the established rules of law and practice. If an effort should be made to put Selvester again upon trial upon the charge in the fourth count, it will then be time to raise the question as to the effect of the proceedings so far had in relation thereto. I assume

that in case of a second trial upon the fourth count the counsel for Selvester will be quick to make the point of former acquittal, or at least twice in jeopardy.

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